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IN THE UNITED STATES DISTRICT COURT
IN AND FOR THE DISTRICT OF ARIZONA

Johnny Wheatcroft and Anya Chapman, as
husband and wife, and on behalf of minors J.
W. and B. W.,

Plaintiffs,

v.

City of Glendale, a municipal entity; Matt
Schneider, in his official and individual
capacities; Mark Lindsey, in his official and
individual capacities; and Michael Fernandez,
in his official and individual capacities;

Defendants.

Case No.: 2:18-cv-02347-SMB

**PLAINTIFFS' MOTION
REGARDING THE CONFLICT OF
INTEREST AMONG DEFENDANTS**

Plaintiff Johnny Wheatcroft, individually, and on behalf of minors J.W. and B.W. (collectively, "Plaintiffs"), respectfully requests the Court's assistance in connection with conflicts of interest among the Defendants which are represented by the same counsel. Specifically, Plaintiffs are requesting separate counsel for the individually named Defendants due to non-waivable conflicts relating to settlement and evidentiary discussions.

Prior to filing this Motion, undersigned counsel provided a copy of this Motion to defense counsel, and undersigned counsel spoke with defense counsel today prior to filing this Motion.

RELEVANT BACKGROUND

Defendants in this matter consist of the City of Glendale (“Glendale”) and 3 individual officers, which include Defendants Matt Schneider (“Schneider”), Mark Lindsay (“Lindsay”) and Michael Fernandez (“Fernandez”), who are represented by the same counsel of record. Defendant Glendale is fully represented in this matter, while the individual officers are being represented under a reservation of rights, which may expose the individual Defendants to personal liability.

The current deadline for settlement discussions is March 26, 2021. On January 20, 2021, Plaintiff’s counsel advised counsel for Defendants that Plaintiffs wanted to discuss matters with Defendants Schneider, Fernandez, and Lindsay which would create non-waivable conflicts between and among the individual Defendants as well as with Defendant City of Glendale. *See* Exhibit A. These matters include settlement discussions and evidentiary issues that would conflict among the various Defendants. Given the non-waivable conflicts, Plaintiffs requested contact information for separate counsel for the individually named defendants so those matters could be discussed. *Id.* Further, Plaintiffs do not want each Defendant to know of the offers we make to the other Defendants, which would make it impossible for counsel to know details for the individual Defendants but be unable to inform the other Defendants of the offers due to ethical obligations.

On January 29, 2021, counsel for Defendants responded by demanding to know the details as to each of the matters Plaintiffs wished to discuss with each individual Defendant. *See* Exhibit B. Given the nature of the non-waivable conflicts that would exist, counsel for Defendants would be disqualified from representing any of the Defendants if he received the information which Plaintiffs wants to discuss with the individual defendants. However, to avoid disqualification as to all of the Defendants, Plaintiffs was proposing that separate counsel be provided only as to the individual Defendants.

Therefore, on February 1, 2021, Plaintiffs advised of the non-waivable conflicts as to the

1 subject matter of the communications and again requested separate legal counsel for the individual
 2 Defendants. *See* Exhibit C. However, no response was received. Thereafter, on February 24,
 3 Plaintiffs again reached out to counsel for Defendants advising of the March 26, 2021 deadline to
 4 engage in settlement discussions and requesting Defendants Schneider, Fernandez, and Lindsay
 5 have separate counsel for the settlement discussions. *See* Exhibit D. On March 1, 2021, counsel
 6 for Defendants responded by again requesting details of the non-waivable conflict matters and
 7 stating that he would get respond at a later time as to the prospective identification of counsel.
 8 *See* Exhibit E.

9 On March 4, 2021, Plaintiffs informed counsel for Defendants that the non-waivable
 10 conflicts relate to settlement matters and evidentiary issues and again requested contact
 11 information for separate counsel for the individual defendants. *See* Exhibit F. In response, on
 12 March 5, 2021, counsel for Defendant threatened to seek sanctions if Plaintiffs seek this Court's
 13 assistance to resolve the conflict issue. *See* Exhibit G.

14 **ARGUMENT**

15 To be clear, Plaintiffs are not moving to disqualify defense counsel in this matter at this
 16 time. Rather, Plaintiffs wish to discuss potential settlement and evidentiary issues with the
 17 individual Defendants, and the nature of those discussions necessarily create non-waivable
 18 conflict among the Defendants. The matters which Plaintiffs which to discuss with each
 19 Defendant are directly adverse to the other Defendants. Thus, if Plaintiffs exposed current counsel
 20 for all Defendants to those matters, a non-waivable conflict would exist between and among the
 21 Defendants, which would likely lead to a disqualification that Plaintiffs are seeking to avoid.

22 The Arizona Rules of Professional Conduct mandate that a lawyer representing multiple
 23 parties disclose the existence and nature of all claims and settlements to each of the parties being
 24 represented, such that each party knows the details of the claims and any settlement of the other
 25 parties. *See* E.R.1.8(g)(When representing two or more clients, "[t]he lawyer's disclosure shall
 26

1 include the existence and nature of all the claims or pleas involved and of the participation of each
 2 person in the settlement.”). In addition, “ER 1.7(a)(1) prohibits a lawyer from representing one
 3 client directly adverse to another client.” *In re Alexander*, 232 Ariz. 1, 9, ¶ 31, 300 P.3d 536, 544
 4 (2013). Further, ER 1.7(b) states:

5 A lawyer shall not represent a client if the representation of that client may be
 6 materially limited by the lawyer's responsibilities to another client or to a third
 person, or by the lawyer's own interests, unless:

7 (1) the lawyer reasonably believes the representation will not be adversely
 affected; and

8 (2) the client consents after consultation. When representation of multiple
 9 clients in a single matter is undertaken, the consultation shall include explanation of
 the implications of the common representation and the advantages and risks
 involved.

10 *See also Matter of Shannon*, 179 Ariz. 52, 60, 876 P.2d 548, 556, modified, 181 Ariz. 307, 890
 11 P.2d 602 (1994).

12 When representing multiple clients, a conflict may also exist if there is a significant risk an
 13 attorney will be materially limited in his/her ability to advise, recommend, or carry out an action
 14 for one client that may not be in the best interest of another client. The comments to E.R. 1.7
 15 provide guidance as follows:

16 [8] Even where there is no direct adverseness, a conflict of interest exists if there is
 17 a significant risk that a lawyer's ability to consider, recommend or carry out an
 appropriate course of action for the client will be materially limited as a result of the
 18 lawyer's other responsibilities or interests. For example, **a lawyer asked to**
 19 **represent several individuals seeking to form a joint venture is likely to be**
 20 **materially limited in the lawyer's ability to recommend or advocate all possible**
 21 **positions that each might take because of the lawyer's duty of loyalty to the**
 22 **others. The conflict in effect forecloses alternatives that would otherwise be**
 23 **available to the client.** The mere possibility of subsequent harm does not itself
 require disclosure and consent. **The critical questions are the likelihood that a**
 24 **difference in interests will eventuate and, if it does, whether it will materially**
 25 **interfere with the lawyer's independent professional judgment in considering**
 26 **alternatives or foreclose courses of action that reasonably should be pursued**
on behalf of the client. [Emphasis added.]

Here, the matters which Plaintiffs which to discuss with each Defendant are directly
 adverse to the other Defendants. Thus, if Plaintiffs exposed Defendants' current counsel to those
 matters, a non-waivable conflict would exist between and among the Defendants, which would

likely lead to a disqualification that Plaintiffs are trying to avoid.

In addition, given the individual Defendants are represented under a reservations of rights while Defendant Glendale is fully covered, the individual Defendants have personal exposure, and they may be open to settlement and evidentiary discussions that may be directly adverse to Defendant Glendale. As a result, current counsel for Defendant would be materially limited in his ability to recommend or advocate all possible positions that each Defendant might take due to the duty of loyalty to the others, which may foreclose alternatives that would otherwise be available to the other Defendants.

Therefore, separate counsel for Defendants is necessary to allow open discussions that may conflict with and among the various Defendants and may potentially resolve this matter as to some or all of the parties. The non-waivable conflict may potentially resolve itself through separate counsel and would not result in any potential for disqualification.

CONCLUSION

Given this situation, Plaintiffs respectfully seek the Court's guidance and request an Order requiring separate counsel be afforded to the individually named Defendants due to non-waivable conflicts. To avoid potential disqualification of defense counsel and to assist the Court in this matter, Plaintiffs request the ability to provide details of the non-waivable conflict to the Court ex parte.

RESPECTFULLY SUBMITTED this 10th day of March, 2021.

ATTORNEYS FOR FREEDOM

By: /s/ Jody L. Broaddus

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Attorneys for Plaintiffs

